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No. 03-1071

In the Supreme Court of the United States

COUNTY OF OKANOGAN, WASHINGTON, ET AL.,
PETITIONERS

v.

NATIONAL MARINE FISHERIES SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
THOMAS L. SANSONETTI
Assistant Attorney General
ELLEN J. DURKEE
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

Whether the United States Forest Service, when renewing revocable special use permits that authorize use of National Forest land for irrigation ditches, may impose conditions that limit the amount of water conveyed through the ditches to avoid jeopardizing endangered fish.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 347 F.3d 1081. An earlier opinion of the court of appeals (Pet. App. C1-C6) is not published in the *Federal Reporter* but is reprinted in 74 Fed. Appx. 739, and was withdrawn by 79 Fed. Appx. 350. The opinion of the district court (Pet. App. D1-D19) is unreported.

JURISDICTION

The initial opinion of the court of appeals was issued on August 14, 2003. A petition for rehearing was denied on October 24, 2003 (Pet. App. B1-B2). The substitute opinion of the court of appeals was issued on October 29, 2003, and the court's judgment (Pet. App.

A11-A12) was entered on that date. The petition for a writ of certiorari was filed on January 27, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners challenge conditions imposed by the United States Forest Service in two special use permits that authorize the permit holders to use ditches on land in the Okanogan National Forest to convey water. The challenged conditions require the permit holders to modify diversion operations, if necessary, in order to maintain specified minimum flows in the Early Winters Creek and Chewuch River. The conditions were imposed to ensure that the Forest Service's discretionary decision to issue the permits did not jeopardize the continued existence of two species of fish listed as endangered under the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531 *et seq.* Both the district court and court of appeals upheld the permit conditions.

1. a. In 1897, Congress enacted the Act of June 4, 1897 (Organic Act), ch. 2, 30 Stat. 34, which authorized the creation and management of forest reserves (now known as national forests). The Organic Act provided that the purposes of the reserves were "to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States." 16 U.S.C. 475. The Organic Act authorized the Forest Service to "make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction." 16 U.S.C. 551. In 1960, Congress enacted the Multiple-

Use Sustained-Yield Act (MUSYA), 16 U.S.C. 528 *et seq.*, to supplement the purposes behind the creation and maintenance of the national forests. See 16 U.S.C. 528. The MUSYA declared that "[i]t is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C. 528. In 1976, Congress enacted the National Forest Management Act (NFMA), 16 U.S.C. 1600 *et seq.*, which requires land management plans for the national forests to take into consideration the "protection of forest resources, to provide for * * * watershed, wildlife, and fish;" and to "provide for diversity of plant and animal communities." 16 U.S.C. 1604(g)(3)(A) and (B).

b. Congress has also authorized the grant of rights-of-way through national forests for various purposes, including water ditches. The rights-of-way at issue in this case were first issued under the Act of February 15, 1901 (1901 Act), ch. 372, 31 Stat. 790, 43 U.S.C. 959 (repealed 1976). The 1901 Act authorized the Secretary of the Interior, upon approval of the Department under whose supervision a federal reservation of land falls and "upon a finding by him that the same is not incompatible with the public interest," to permit the use of rights-of-ways through forest reservations for water ditches. 43 U.S.C. 959. The 1901 Act further provided: "That any permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park." 43 U.S.C. 959. Thus, the 1901 Act provided a ditch operator with a license revocable at the discretion of the government rather than a vested property

interest. After jurisdiction over forest reserves was transferred to the Secretary of Agriculture in 1905, see Act of Feb. 1, 1905, ch. 288, 33 Stat. 628, persons seeking rights-of-way across reserved forest lands to construct and operate water ditches had to apply to the Forest Service for a special use permit.

In 1976, Congress repealed the 1901 Act and other laws governing issuance of rights-of-way on federal lands and replaced them with provisions of the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. 1701 *et seq.* FLPMA authorizes the Secretary of Agriculture to renew rights-of-way through national forests for ditches for the transportation of water, 43 U.S.C. 1761(a)(1), and requires the rights-of-way to contain terms and conditions that will "minimize damage to * * * fish and wildlife habitat and otherwise protect the environment." 43 U.S.C. 1765(a). FLPMA provides that "[a]ll actions by the Secretary concerned under this Act shall be subject to valid existing rights." 43 U.S.C. 1701 note (Savings Provision), Pub. L. No. 94-579, § 701(h), 90 Stat. 2786. But FLPMA does not enlarge the rights of permit holders whose existing permits are only revocable licenses.

c. The ESA, which was enacted in 1973, requires each federal agency to ensure that its actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification" of designated critical habitat. 16 U.S.C. 1536(a)(2). To that end, whenever a federal agency plans to take an action that "may affect" a threatened or endangered species, the agency must consult with the Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS) (consulting agency) before taking the action. 50 C.F.R. 402.14(a). Formal consultation typically concludes with

the issuance of a biological opinion by the consulting agency that assesses the likelihood of jeopardy to the listed species and whether the proposed action will result in destruction or adverse modification of the species' critical habitat. See 50 C.F.R. 402.14. If the consulting agency determines that the proposed action is likely to jeopardize the continued existence of the species or result in an adverse modification of critical habitat, it must determine whether there are any "reasonable and prudent alternatives." 16 U.S.C. 1536 (b)(3)(A); 50 C.F.R. 402.14(h)(3).

2. a. The Washington Forest Reserve, predecessor to the Okanogan National Forest, was established by Presidential Proclamation on February 22, 1897. Proclamation No. 27, 29 Stat. 904; Pet. App. A3. In 1903, the founders of the Skyline Ditch Company (Skyline) applied for a permit to construct and maintain a water ditch located in the Forest. Pet. App. A3. The Department of the Interior approved Skyline's application with the proviso that the permit would be "subject to revocation by the Secretary of the Interior, in his discretion, at any time." *Ibid.* In October 1903, a special use permit was issued that stated that the permit was "[t]erminable at the discretion of the Forester of the U.S. Department of Agriculture." *Ibid.* In 1971, the permit was superseded by a "revocable and nontransferable" special use permit, which provided that the permit could be terminated "at the discretion of the regional forester or the Chief, Forest Service," and could be renewed only if the permit holder complied with "the then-existing laws and regulations governing the occupancy and use of National Forest Lands." *Id.* at A3-A4.

In 1909, the predecessor to the Early Winters Ditch Company (Early Winters) applied to the Forest Service

for a special use permit to construct and operate an irrigation ditch on national forest land. On October 16, 1909, the Forest Service issued a permit that required the holder to "comply with all the laws and regulations governing National Forests" and provided that the permit would "terminate . . . at the discretion of the Forester." Pet. App. A4. Renewal permits similarly stated that the permits were terminable at the discretion of the Forest Service and further stated that the permits conferred no right upon the permit holder to use the water involved. *Ibid.* Beginning in 1971, the permits provided a fixed expiration date and stated that they were subject to renewal only if the permit holder complied with "the then-existing laws and regulations governing the use and occupancy of National Forest Lands." *Ibid.*

All subsequent permits for the two ditches contained similar conditions. For example, they provided that new permits would be issued "in the absolute discretion of the Forest Service," that they could be "amended at the discretion of the Forest Service to incorporate new terms required by law," and that the permit holder was required to comply with all applicable federal laws, including "relevant environmental laws." Pet. App. A4. The permits also stated that they did "not convey any legal interest in water rights as defined by applicable State law." *Ibid.*[1]

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[1] Because both the Skyline Ditch and the Early Winters Ditch were constructed after creation of the Washington Forest Reserve, petitioners are incorrect in asserting (Pet. 3) that the ditches were built on "unreserved" public land. The record establishes that petitioners' water rights also post-date creation of the Reserve in 1897. See 2 C.A. Supplemental Excerpts of Record (SER) 316 (Early Winters water rights date from 1907); *id.* at 317 (Skyline water rights date from 1902).

b. Between 1997 and 1999, steelhead trout and chinook salmon, two species of fish that inhabit Early Winters Creek and the Chewuch River, were listed as endangered under the ESA. 62 Fed. Reg. 43,937 (1997); 64 Fed. Reg. 14,308 (1999). Because the Forest Service concluded that the Skyline and Early Winters permits were likely to adversely affect the steelhead and chinook, it initiated consultation under the ESA with NMFS. Pet. App. A5-A6; 1 C.A. Supplemental Excerpts of Record (SER) 77-80.[2]

In its biological opinion on the Skyline permit, NMFS determined that the permit would jeopardize the chinook and steelhead. Pet. App. A5; 1 SER 113. NMFS proposed that the Forest Service condition the permit to require that Skyline repair fish screens and headgate structures and modify or curtail its diversion of water when flow levels in the Chewuch River fall below specified levels at specified times. Pet. App. A6; 1 SER 115-116. The Forest Service modified Skyline's permit by providing Skyline with a new Operation and Management Plan containing the instream flow requirements recommended in the biological opinion. Pet. App. A6; 1 SER 131. Skyline, which is not a party to this action, did not contest the permit conditions. Instead, Skyline proposed to comply with the conditions by substituting groundwater for reduced diversions from the river and by replacing the ditch with an enclosed pipe conveyance system, which would reduce diversions by eliminating the need for water that is now

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[2] Although each permit was renewed in 1998, the permit holders were given notice that the ESA consultation process was not complete and that the permits might be amended to include conditions required by the consulting agency. Pet. App. A5.

lost because of leakage during conveyance. 1 SER 86, 87; 67 Fed. Reg. 7122 (2002).

NMFS prepared a draft biological opinion on the Early Winters permit that concluded that the proposed permit would jeopardize the chinook and steelhead. Before NMFS prepared the final opinion, Early Winters agreed to accept an instream flow requirement in its Operation and Maintenance Plan. 2 SER 209, 212-213. Surface water diversion would be replaced or augmented as necessary by groundwater obtained through wells. *Id.* at 213. Based on Early Winters' agreement to modify its Operation and Maintenance Plan, NMFS found in its final biological opinion that the proposed permit was not likely to jeopardize the species or adversely modify critical habitat. Pet. App. A6; 2 SER 212, 230, 240. Early Winters ditch users subsequently obtained state approval to change the point of water diversion and to install groundwater extraction wells that allow them to obtain their full water allocation when diversion through the Early Winters ditch is reduced or shut down because of low flow. *Id.* at 213, 302-314.

3. Petitioners—the Early Winters Ditch Company, two landowners, and Okanogan County—filed suit for declaratory and injunctive relief against the Forest Service, FWS, and NMFS, alleging, in relevant part, that the Forest Service lacked authority to impose the instream flow conditions on the Skyline and Early Winters permits. C.A. E.R., Tab 1.

The United States District Court for the Eastern District of Washington granted summary judgment in favor of the government. Pet. App. D1-D19. The court began by observing that petitioners had mischaracterized the case in asserting that it involved the question whether the government had authority to confiscate

petitioners' water rights. *Id.* at D3. The court noted that "this is not a controversy about water rights, but over rights-of-way through lands of the United States, which is a different matter." *Ibid.* The court explained that the government was not claiming any water rights by conditioning the special use permits, because petitioners retain their water rights and may be able to divert the water through alternate means or from an alternate diversion point. *Ibid.*

Turning to the question whether the government had authority to impose the permit conditions, the court held that the statutes governing the management of national forests, in particular the MUSYA, authorized the Forest Service to impose minimum instream flow restrictions on a special use permit to protect fish. Pet. App. D4-D10. The court further held that the terms of the particular permits at issue here did not restrict the Forest Service's authority to impose conditions on the permits. *Id.* at D10-D13. Because the Forest Service had authority under applicable statutes and the permits to impose the instream flow conditions, the court held that the ESA required the Forest Service to exercise its authority to condition the permits in order to ensure that their renewal would not jeopardize the continued existence of endangered species. *Id.* at D14-D16.

4. The court of appeals affirmed. Pet. App. A1-A10. Reviewing the statutes that govern management of national forests and the language of the permits, the court concluded that the Forest Service had authority to restrict the use of revocable rights-of-way to protect endangered fish. *Id.* at A7-A10. The court agreed with petitioners that the ESA does not grant the Forest Service powers that it does not otherwise have, but the court concluded that the Forest Service had ample authority to condition the permits under the Organic

Act, the MUSYA, and FLPMA. *Id.* at A8-A9. The court held that the savings clause of FLPMA preserving valid existing rights was inapplicable here because petitioners had no vested rights to use the ditches when FLPMA was enacted. *Id.* at A9. The court explained that the "rights-of-way were always, by their written terms, revocable at the discretion of the federal government." *Ibid.* The court also rejected petitioners' reliance on *United States* v. *New Mexico*, 438 U.S. 696 (1978). *New Mexico*, the court explained, did not address the power of the Forest Service to restrict the use of rights-of-way over federal land. Pet. App. A10.

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. All of the reasons that petitioners offer to support their request for review are based on the erroneous premise that the instream flow restrictions placed on the revocable right-of-way permits confiscate petitioners' state water rights. It is firmly established, however, that a state water right is distinct from, and does not carry with it, the right to convey the water across federal land.

In *Utah Power & Light Co.* v. *United States*, 243 U.S. 389 (1917), this Court held that power companies with state water rights could not maintain pipelines and other facilities on national forest lands without complying with federal law regulating access to Forest Service land. The Court held that state laws respecting water rights have "no bearing" on a controversy involving the use of federal lands unless they have been adopted or

made applicable by Congress. In a statement directly applicable here, the Court stated:

> Much is said in the briefs about several congressional enactments providing or recognizing that rights to the use of water in streams running through the public lands and forest reservations may be acquired in accordance with local laws, but these enactments do not require particular mention, for this is not a controversy over water-rights, but over rights of way through lands of the United States, which is a different matter and is so treated in the right-of-way acts before mentioned.

243 U.S. at 410-411 (citing *Snyder* v. *Colorado Gold Dredging Co.*, 181 F. 62, 69 (8th Cir. 1910)).

As explained in *Snyder*, under the common law, the right to water does not carry with it a right to convey the water across another landowner's property, even if that is the only means of conveying the water to the land on which it will be used:

> The right to appropriate the waters of a stream does not carry with it the right to burden the lands of another with a ditch for the purpose of diverting the waters and carrying them to the place of intended use, for that cannot be done without a grant from the landowner or a lawful exercise of the power of eminent domain; and this although the particular circumstances be such that the proposed appropriation cannot be effected without the ditch.

Snyder, 181 F. at 69. See *City & County of Denver* v. *Bergland*, 695 F.2d 465, 483-484 (10th Cir. 1982) (citing that principle in holding that Denver's right to use certain waters did not include the right to maintain water diversion facilities on national forest lands). Washing-

ton law accords with that general common law principle. *Hallauer* v. *Spectrum Props., Inc.*, 18 P.3d 540, 548-549 (Wash. 2001) (water right does not include right to convey water across the lands of another).

The Forest Service's imposition of restrictions on the ditch companies' rights-of-way across the Okanogan National Forest thus does not appropriate any of petitioners' water rights. On the contrary, the ditch companies may continue fully to exercise their water rights by transferring the point of diversion of the water to a location that does not require conveyance of the water across federal land. Under Washington law, a change in the point of diversion is available (regardless of the impact on instream flows) if, as here, the water has been put to beneficial use and the change can be made without injury to existing rights. *Public Util. Dist. No. 1* v. *State, Dep't of Ecology*, 51 P.3d 744, 752-753 (Wash. 2002). Indeed, Early Winters, the only ditch company that is contesting the permit conditions, has already obtained approval to transfer its point of diversion. See pp. 7-8, *supra*.[3]

Thus, contrary to petitioners' suggestion, the court of appeals' opinion does not recognize a general "federal authority to reallocate state water when the water crosses federal land." Pet. 11. The court's decision merely recognizes federal authority to regulate revoca-

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[3] Petitioners suggest (Pet. 3, 6) that their state water rights include ownership of the point of diversion even though that point is located on federal land. Contrary to that suggestion, rights to federal land cannot be acquired under state law, but only as provided by an Act of Congress. See U.S. Const. Art. IV, § 3, Cl. 2; *Utah Power & Light Co.*, 243 U.S. at 404. Moreover, even if petitioners' water rights included the point of diversion, those rights would still not include an easement or vested right-of-way to transfer the water across federal land. See pp. 11-12, *supra*.

ble rights-of-way across federal land. As *Utah Power & Light* firmly established almost 90 years ago, the exercise of federal power to regulate rights-of-way for water conveyances over federal land neither displaces state authority to allocate water rights nor effects an appropriation of water rights. That remains true even when the federal regulation takes the form of minimum stream flow requirements. Cf. *PUD No. 1 of Jefferson County* v. *Washington Dep't of Ecology*, 511 U.S. 700, 720-722 (1994) (minimum stream flow requirements imposed under Clean Water Act do not allocate water or impermissibly intrude on state authority to allocate water); *Public Util. Dist. No. 1*, 51 P.3d at 764-766 (imposition of instream flow conditions to preserve water quality does not appropriate water rights and is not governed by state water appropriation law).

Because the court of appeals' decision does not authorize federal confiscation or reallocation of water rights, petitioners err in contending (Pet. 11-14) that the court's opinion disrupts Western water law and the federal-state balance. The power of federal land managers to deny, revoke, or condition use of federal lands for ditches and the authority of States to allocate water resources have coexisted for over a century, and the court of appeals' opinion correctly reflects that co-existence.

2. Petitioners also err in contending (Pet. 15-21) that the the court of appeals' decision conflicts with *United States* v. *New Mexico*, 438 U.S. 696 (1978). The question presented in *New Mexico* was how much water the United States had reserved under the "implied-reservation-of-water doctrine" when it set aside a national forest. *Id.* at 698. Under that doctrine, "Congress, in giving the President the power to reserve portions of the federal domain for specific federal purposes,

impliedly authorized him to reserve 'appurtenant water then unappropriated *to the extent needed to accomplish the purpose of the reservation.*'" *Id.* at 699-700 (emphasis added) (quoting *Cappaert* v. *United States*, 426 U.S. 128, 138 (1976)).

In *New Mexico*, the Court held that a forest reservation under the Organic Act did not include an implied reservation of water for aesthetic, recreational, stock-watering or fish-preservation purposes. 438 U.S. at 704-705, 718. The Court further held that, although the MUSYA broadened the purposes for which national forests "*are* established and *shall* be administered," to include preserving wildlife and fish, the MUSYA did not expand the water rights reserved to the United States at the time of a forest's creation. *Id.* at 713-715.

New Mexico is inapposite here because the government is not claiming any water rights in this case, and the authority for the permitting decisions concerning the ditches across national forest lands does not rest on an implied reservation of water rights for those lands. Rather, the authority to condition permits authorizing use of federal land rests on Congress's broad powers under the Property Clause of the Constitution. U.S. Const. Art. IV, § 3, Cl. 2.

As the court of appeals correctly held, the federal statutes governing forest management, in which Congress exercised its plenary power under the Property Clause to regulate federal land, authorize the Forest Service to condition permission to use those lands. See Pet. App. A8-A9. Here, the conditions that the Forest Service imposed are reasonable and indeed are directly germane to the purposes of the National Forests themselves. The Organic Act provides the Forest Service with authority to regulate "occupancy and use" of National Forests to "insure the objects of such reserva-

tions." 16 U.S.C. 551. The MUSYA expressly provides that "the national forests are established and shall be administered for * * * wildlife and fish purposes." 16 U.S.C. 528. NFMA confirms that fish and watershed protection are proper forest management objectives. See 16 U.S.C. 1604(g)(3)(A) and (B). And FLPMA expressly requires permits that "renew rights-of-way over" public lands for "ditches * * * for the * * * transportation of * * * water" to "contain * * * terms and conditions which will * * * minimize damage to * * * fish and wildlife habitat and otherwise protect the environment." 43 U.S.C. 1761(a)(1), 1765(a).

Contrary to petitioners' contentions (Pet. 15-18), *New Mexico*'s holding that forest reservations under the Organic Act did not impliedly reserve water for fish or wildlife purposes does not mean that the Forest Service lacks authority to regulate the use of national forest land for the benefit of fish and wildlife. If anything, *New Mexico* supports the existence of that authority because the Court recognized in that case that the MUSYA broadened the purposes of national forests and requires the Forest Service to administer all national forests, "including those previously established," for fish and wildlife purposes. 438 U.S. at 714. *New Mexico* neither overrules nor erodes this Court's holding in *Utah Power & Light Co.*, which rejected an attempt, similar to petitioners' attempt here, to recast a dispute over rights-of-way over federal land as a water rights issue and to construe narrowly federal authority to regulate the use of national forest land.

Petitioners are also incorrect in arguing (Pet. 19-21) that FLPMA's preservation of "valid existing rights" (43 U.S.C. 1701 note) prevents the Forest Service from imposing the permit conditions at issue here. Petitioners have never possessed any vested right to main-

tain a ditch across national forest land. The 1901 Act provided permit holders with only a revocable license and stated that a permit could "not be held to confer any right, or easement, or interest in, to, or over any public land, reservation or park." Act of Feb. 15, 1901, ch. 372, 31 Stat. 790 (43 U.S.C. 959) (repealed 1976). Moreover, petitioners' "rights-of-way were always, by their written terms, revocable at the discretion of the federal government." Pet. App. A9; compare *Public Lands Council* v. *Babbitt*, 529 U.S. 728, 741-743 (2000). And, as discussed above, petitioners are incorrect in contending that the permit conditions confiscate their water rights under state law. See pp. 10-13, *supra*.

3. Petitioners also mistakenly assert (Pet. 21-23) that the court of appeals' decision holds that Section 7 of the ESA creates federal authority to allocate water rights. Contrary to that assertion, the court of appeals expressly stated that "the ESA does not grant powers to federal agencies they do not otherwise have." Pet. App. A8. As the court of appeals also recognized, however, the ESA requires federal agencies to take steps within their existing authority to ensure that their discretionary actions do not jeopardize the continued existence of endangered species. See *ibid.* Because both the statutes governing management of national forests and the terms of the Skyline and Early Winters permits authorize the Forest Service to condition the permits and allow it to do so in order to protect fish and wildlife, the ESA required the Forest Service to exercise that authority in a way that did not jeopardize the endangered chinook and steelhead.

4. Petitioners incorrectly argue (Pet. 23-25) that the Forest Service's authority must be narrowly construed to avoid constitutional concerns. Contrary to petitioners' suggestion (Pet. 23-24), the principle that police

powers are generally reserved to the States does not restrict federal control over the use of federal land, which is plenary. See *Kleppe* v. *New Mexico*, 426 U.S. 529, 536-541 (1976) (Congress's power over public lands is without limitations and analogous to the police power of the States); *Utah Power & Light Co.*, 243 U.S. at 405 (Congress has power to control use and occupancy of federal lands "and to prescribe the conditions upon which others may obtain rights in them, even though this may involve the exercise in some measure of what commonly is known as the police power"); *Light* v. *United States*, 220 U.S. 523, 536 (1911) (the federal government may "prohibit absolutely or fix the terms on which its property may be used"). The cases on which petitioners rely (Pet. 23-24) are inapposite because they do not involve the exercise of federal control over federal property.

Petitioners' argument (Pet. 24-25) that the Forest Service's actions raise constitutional concerns under the Fifth Amendment's Takings Clause also lacks merit. There is no takings issue in this case because the Forest Service has not confiscated petitioners' water rights. *Tulare Lake Basin Water Storage District* v. *United States*, 49 Fed. Cl. 313 (2001), on which petitioners rely (Pet. 24), does not support their takings claim. The plaintiffs in *Tulare Lake* sought compensation for the taking of contractual rights which the court held entitled them to receive a fixed volume of water from a reclamation project. *Id.* at 314-315. Here, petitioners challenge a restriction on permits to use federal land that by their terms are completely revocable at the discretion of the Forest Service without compensation to the permit holders. A revocable license or permit, no matter how valuable to the holder, does not constitute property for which the government is liable upon modi-

fication or termination. *Bradshaw* v. *United States*, 47 Fed. Cl. 549, 553 (2000); *Acton* v. *United States*, 401 F.2d 896, 899-900 (9th Cir. 1968), cert. denied, 393 U.S. 1121 (1969); see *United States* v. *Fuller*, 409 U.S. 488 (1973). Even if there were some possibility that Forest Service's actions constituted a taking, petitioners' remedy would not be a suit to enjoin the actions but rather a suit for compensation. See *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-128 (1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
THOMAS L. SANSONETTI
Assistant Attorney General
ELLEN J. DURKEE
Attorney

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